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No. 87-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ARTHUR YOUNG & COMPANY,

Petitioner

- v. -

THE BANK OF NEW ORLEANS AND TRUST CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a movant entitled to summary judgment as a matter of law when, contrary to Fed. R. Civ. P. 56, the non-movant submits no evidence whatsoever in support of an essential element of its claim, and as to which it bears the burden of proof, but relies solely on unsupported allegations in its pleadings?

2. When the non-movant opposes a summary judgment motion under Fed. R. Civ. P. 56 by mere allegations in pleadings unsupported by any evidence, may the evidentiary burden of proof in connection with an element of the non-movant's case be shifted to the movant, thus charging such party with the obligation to negate the non-movant's allegations?

LIST OF PARTIES

The petitioner and defendant below is Arthur Young & Company, a general partnership of certified public accountants with offices throughout the United States which provides accounting, auditing, tax, and management advisory services to its clients. The respondent, plaintiff below, is The Bank of New Orleans and Trust Company ("BNO"), a Louisiana banking corporation.[1]

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1 The District Court granted BNO's motion to substitute First National Bank of Commerce as the proper party plaintiff as successor to BNO through merger.

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- v. -

THE BANK OF NEW ORLEANS AND TRUST CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Arthur Young & Company ("Arthur Young") petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 823 F.2d 888 (5th Cir. 1987), is set forth in the Appendix ("A.___") at A.1a to A.19a. The order denying Arthur Young's petition for rehearing is set forth in the Appendix at A.20a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1987. A timely petition for rehearing was denied by that court on October 22, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

Rule 56 of the Federal Rules of Civil Procedure in relevant part provides:

> **(b) For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> **(c) Motion and Proceedings Thereon.** . . . The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .
>
> * * *
>
> **(e) Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated

therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

* * *

STATEMENT OF THE CASE

I.

THE PARTIES AND THE COMPLAINT

The Bank of New Orleans and Trust Company ("BNO") seeks recovery of funds it loaned to Monco Agency, Inc. ("Monco") in November, 1981 and January, 1982. To secure payment of the loans, Monco pledged stock in its wholly-owned subsidiary, Cotton Belt Insurance Company ("CBIC"). The loans went into default shortly thereafter in March, 1982 as a result of CBIC's financial problems. Petitioner Arthur Young was the independent auditor of Monco's annual financial statements.

On July 1, 1982 BNO filed suit in the Eastern District of Louisiana against Monco and its president and principal shareholder, Oliver S. Montagnet, Jr. ("Montagnet") alleging violations of both the federal securities laws and the Louisiana Blue Sky Law. BNO alleged that Monco and Montagnet made fraudulent misstatements and omissions concerning Monco's and CBIC's financial condition and that these frauds induced BNO's loans. Notwithstanding that BNO's fraud allegations included averments that Monco's audited financial statements were false and misleading, Arthur Young was not named as a defendant in the July 1, 1982 complaint.

In August, 1983, more than one year after BNO's complaint was filed, BNO contacted Arthur Young expressing a fear that prescription (Louisiana's term for the statute of limitations) on possible claims by BNO against Arthur Young was about to expire.[1] BNO told Arthur Young, however, it did not wish to sue Arthur Young and therefore asked for an agreement concerning the interruption of prescription as to Arthur Young. BNO and Arthur Young thereafter agreed that any subsequent action brought by BNO against Arthur Young would be deemed filed as of August 10, 1983. The agreement was drafted in such a manner that any claim which had expired by August 10, 1983 would not be revived.

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1 There is no dispute that the applicable period of prescription to BNO's negligence claim against Arthur Young is one year.

Notwithstanding BNO's claim that it did not want to sue Arthur Young, on May 31, 1984[2] BNO filed its Third Amending Complaint adding Arthur Young. Unlike the original allegations against Monco and Montagnet, which asserted fraud-based securities claims, the new allegations against Arthur Young only asserted that Arthur Young had negligently audited Monco's 1980 financial statements *inter alia*, by failing to disclose CBIC's then existing insolvency.[3] BNO further alleged that it reasonably relied upon the 1980 Monco financial statements in making the November, 1981 and January, 1982 loans. The complaint's prayer averred that Arthur Young was liable as an additional defendant *in solido* (Louisiana's peculiar form of joint and several liability derived from the civil law) for losses BNO incurred as a result of its loan to Monco.[4]

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2 By the contractual agreement between Arthur Young and BNO the complaint was deemed filed August 10, 1983. This petition does not raise the Fifth Circuit's absolute disregard of this contractual agreement, which, on its face, precluded a finding of interruption of prescription as to Arthur Young on any other date.

3 The claimed basis of jurisdiction was that Arthur Young was a pendent party.

4 There was no allegation that at any time after Arthur Young's audit Arthur Young knew of Monco's and BNO's relationship, of the BNO-Monco loan, that Monco would apply for a loan, or that Monco would use the audited financial statements in connection with any such application. Nor was Arthur Young alleged to have aided and abetted, conspired, or acted with Monco in connection with the sale of any security. Indeed, BNO and Monco had not even met when Arthur Young conducted its audit.

II.

THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT AND THE COURT OF APPEALS' REVERSAL

Arthur Young moved for summary judgment on the ground that BNO's negligence claim against Arthur Young was prescribed under Louisiana's one-year statute of limitations. In granting Arthur Young's motion, the district court held that BNO had actual or constructive notice of a potential claim against Arthur Young more than one year before the date any action against Arthur Young was deemed filed by the parties' agreement, August 10, 1983. The district court also rejected BNO's argument -- not pleaded in its complaint and raised for the first time in its opposition to summary judgment -- that Arthur Young's alleged solidary liability under Louisiana law with Monco and Montagnet, who were timely sued, interrupted prescription. (A.4a-5a)

The Fifth Circuit reversed, although not because there was any factual dispute of BNO's knowledge of a claim against Arthur Young more than one year before suit. Rather, it held that prescription was interrupted because "BNO . . . properly *alleged* that [Arthur Young] is liable *in solido*" with Monco and Montagnet, who were timely sued.[5] (A.19a) (emphasis added) The Fifth Circuit

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5 BNO alleged, and the Fifth Circuit accepted, that in Louisiana if a party is solidarily liable, prescription is interrupted once any party who is solidarily liable is timely sued. Thus, a solidarily liable defendant who is not sued until ten years after an action is commenced and nine years after prescription ran out, can still be added to a timely filed suit against another even if the plaintiff knew of the claim against the newly added defendant before the

further rejected Arthur Young's argument that BNO failed to satisfy its burden under Fed. R. Civ. P. 56(e) to offer affirmative evidence (beyond conclusory assertions and pleading allegations) of solidary liability or concurrent fault under Louisiana law and to designate specific facts showing a genuine material issue for trial as required by the Federal Rules and the local court rules.

The Fifth Circuit stated that upon trial "in the district court BNO must prove that Arthur Young's negligence played a part in causing its loss on the Monco loan," but that Arthur Young's "assertions that BNO must prove solidary liability at the summary judgment stage erroneously would impose a burden on BNO to prove its negligence case before trial." (A.10a) In holding that to defeat summary judgment BNO did not have to offer any evidence in support of its theory, the Fifth Circuit criticized Arthur Young for "failure" to "submit or argue facts which showed that it did not conduct the audit . . . or that BNO did not rely on the audit. . . . " *Id*. Although BNO's opposition to Arthur Young's motion was based merely on unsupported pleading allegations of solidary liability, the Fifth Circuit panel nonetheless found that BNO had sustained its summary judgment burden.[6] (A. 2a, 10a, 19a)

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period of prescription expired. This rule of law is not challenged on this petition.

6 The case was remanded for further proceedings on BNO's claim against AY. In the interim, BNO settled with Monco and Montagnet and the remaining portion of BNO's suit was dismissed. Thus, but for the Fifth Circuit's erroneous reversal, this case was concluded.

REASONS FOR GRANTING THE WRIT

In assessing the importance of summary motions to litigation practice and procedure, it is essential to focus on the enormous and overwhelming number of lawsuits being filed in federal and state courts. In 1986, over 254,828 lawsuits were filed in the federal courts -- a 41% increase since 1981; during the period 1978 to 1983, 12,000,000 lawsuits (an average of 2,000,000 a year) were filed in state courts. Bacus, *Liability: Trying Times*, NATION'S BUSINESS, February 1986 at 24. With this ever-increasing number of lawsuits, it is fundamental that litigants -- whether they be plaintiffs *or defendants* -- be able to obtain a fair and, if at all possible, timely and inexpensive determination of their claims. Thus, parties must be able to dispose of unsubstantiated claims by summary means, where appropriate.

To this end, this Court has recently and unequivocably declared that motions for summary judgment are an integral part of the Federal Rules designed to promote such an expeditious and just determination of an action. To the extent the lower courts do not properly apply the provisions of Rule 56 and the teachings of this Court, it adds to the court congestion, wastes the limited resources of both the courts and litigants already sorely taxed by the growing volume of cases, and deters, not furthers, the interest of justice.

In acknowledging the beneficial purposes to be served through the appropriate use of summary motions, this Court specifically addressed the right of a defendant in accordance with Rule 56 to have factually insufficient claims dismissed, thereby avoiding an unwarranted and unnecessary trial. While purporting to follow this Court's admonitions, the decision of the Fifth Circuit panel rejects

fundamental holdings of this Court by erroneously ruling that (1) a non-movant has met its burden of coming forward with proof in support of its claim by simply relying on allegations contained in its pleadings and (2) a movant must come forward with evidence negating a non-movant's allegations. By its decision, this panel of the Fifth Circuit has sent an inappropriate and ill-considered message to the lower federal courts concerning the use of summary motions. Its clear failure to follow this Court's recent controlling decisions should be reversed lest the message of those decisions be diluted or eroded by the lower courts, the salutary purpose of Rule 56 be lost, and the already overburdened court system be further clogged with cases which do not belong there any longer.

I

THE APPLICABLE STANDARD FOR SUMMARY JUDGMENT

This Court recently enunciated clear standards to be applied in determining motions for summary judgment. *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986). In adopting these standards, this Court emphasized that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex*, 106 S. Ct. at 2555 (citations omitted). With these considerations in mind, this Court specifically ruled that "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to

make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id* at 2552-2553. Moreover, the nonmoving party who bears such burden is required "to go beyond the pleadings and by . . .[its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 2553; Fed. R. Civ. P. 56(e). "[T]he burden on the moving party may be discharged by 'showing' -- that is, pointing out to the District Court -- that there is an absence of evidence to support the nonmoving party's case." *Id.* at 2554. Thus applied, Rule 56 gives "due regard" for the rights of defendants to be relieved "prior to trial, . . . [of] claims . . . hav[ing] no factual basis." *Id.* at 2555.

Further, the burden on the non-movant to come forward with some evidence is not met if such proof is "merely colorable or is not significantly probative." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. at 2511. The non-movant can defeat summary judgment only if sufficient proof is adduced so that a jury, applying the substantive evidentiary standard of proof concerning the claim at issue, could reasonably find in that party's favor. *Id.* at 2512. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Id.*

The trilogy of cases, particularly *Celotex* and *Anderson*, has been properly interpreted by the commentators as a clear signal to the lower courts to be "less chary of granting summary judgment" in the appropriate case. *E.g.*, Sayler, *Rule 56: Proposals for an Underused Rule*, ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS, 313, 325-26 (1987). If that is what this Court intended, then given the rising tide of

litigation, appropriate reinforcement must occur when the lower courts ignore this Court's directive or misapply the Rule in a manner which threatens to return to an era in which the Rule's salutary benefits of pre-trial disposition were not realized. The need for forceful re-emphasis of this Court's mandate is particularly necessary when, as here, a district court properly applies the Rule only to be reversed by a Court of Appeals' decision that conflicts so plainly with the Rule's literal language and this Court's recent holdings. Otherwise, such prior decisions were for naught.

II

THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT

A. The Fifth Circuit Improperly Held That BNO Met its Burden of Coming Forward With Proof Merely by Relying on Allegations in its Pleadings.

Arthur Young met its burden under Rule 56 when it established that on the very face of the pleading filed in 1984 (and deemed filed in 1983) the period of prescription had expired more than one year before on a claim involving Arthur Young's 1980 audit. *See* Fed. R. Civ. P. 56(b) authorizing a defendant to move "without supporting affidavits." This was further supplemented with undisputed record evidence of BNO's knowledge of a claim more than one year prior to the filing of the amended complaint. At this point, unless BNO offered some reason why prescription had not expired, the action was over. Accordingly, BNO advanced as its justification to overcome the bar apparent on the face of its pleading the theory that Arthur Young was liable *in solido* with Monco and Montagnet. However, this theory for

preserving BNO's claim notwithstanding the obvious prescription bar depends on the linchpin of all the defendants being liable *in solido*.

BNO had the burden of proof concerning its theory of solidarity for two reasons. Solidarity is never to be presumed and the burden of proof is on the party claiming its existence. La. Civil Code, Art. 2093 (now Art. 1796). "[I]t is not sufficient to claim solidary obligation; it must be proved." *Hilbun v. Goldberg*, 823 F.2d 881, 884 (5th Cir. 1987).[7] Further, when, as here, a party relies on a theory to toll or interrupt the statute of limitations, that party has the burden of pleading and proving that theory and the evidence to support it. *E.g., Moor v. Travelers Ins. Co.*, 784 F.2d 632, 633 (5th Cir. 1986); *United Klans of America v. McGovern*, 621 F.2d 152, 153 (5th Cir. 1980).

BNO's theory of solidary liability was that the alleged fraud of Monco and Montagnet concurred with the alleged negligence of Arthur Young to cause BNO's loss. (A.12a, 15a) Rule 56(e), *Celotex* and *Anderson* thus required that in opposing Arthur Young's motion BNO had to do more than rest on its pleadings to prevail on its claim of solidarity or the applicability of its prescription-interruption argument.[8] BNO needed to present sufficient evidence upon which a jury reasonably could find

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7 One day prior to the Fifth Circuit's decision here, a different panel of the Fifth Circuit addressed in *Hilbun* the identical issue of prescription under Louisiana law and affirmed judgment for the defendants.

8 Other Fifth Circuit panels would agree that the non-movant has the burden to come forward with evidence and that summary judgment must follow if no such showing is made. *E.g., Slaughter v. Allstate Ins. Co.*, 803 F.2d 857, 860 (5th Cir. 1986); *Fontenot v. Upjohn*, 780 F.2d 1190, 1195-96 (5th Cir. 1986).

that Arthur Young was solidarily liable with the defendants sued in 1982, *i.e.*, BNO's loss was caused by the concurring tortious acts of Arthur Young and those defendants.[9]

There was not, however, a scintilla of proof submitted on any aspect of its solidary theory by BNO. Despite full and adequate discovery during the two years prior to Arthur Young's motion, BNO filed *no* affidavits, depositions, interrogatory answers or admissions to support its allegations of fault by Arthur Young, fraud by the other defendants, or any concurrence between them giving rise to any theory of solidarity. Indeed, contrary to the statement of material facts required by the district court's Local Rule 3.10,[10] BNO's statement failed to identify even a single issue of disputed fact or proof; it merely recited three brief unsupported legal conclusions -- only one of which even related in a vague way to the issue of solidary liability. (A.23a) The absence of *any* proof by BNO whatsoever in support of its solidary liability theory was ignored by the Fifth Circuit, however, because it erroneously concluded that BNO satisfied its

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9 For example, BNO had to offer at least some proof of the following matters: (1) the alleged fraud of Monco and Montagnet, *i.e.*, their false statements or omissions, their intent to deceive, BNO's reliance and damage; (2) Arthur Young's negligence, *i.e.*, failure to conduct its audit in accordance with generally accepted auditing standards resulting in a set of inaccurate financial statements, proximate causation, and damage; (3) a duty owed to it despite the fact it was not Arthur Young's client; and (4) how these independent alleged tortious acts of Arthur Young and Monco and Montagnet concurred or coalesced to cause its loss.

10 Eastern District of Louisiana Local Rule 3.10 is set forth in the Appendix at A.21a.

burden merely by alleging the theory in its pleadings. (A.10a) In the view of the Fifth Circuit panel, to require more of BNO would unnecessarily "impose a burden on BNO to prove its negligence case before trial." (A.10a)

The Fifth Circuit's holding squarely conflicts with this Court's holdings in *Celotex* and *Anderson*, and the plain language of Rule 56(e) requiring that summary judgment "shall" be granted unless the non-movant makes the very evidentiary showing the Fifth Circuit panel dispensed entirely with here. This case thus presents a clear framework for relief by *certiorari*.

The issue is simply whether a non-moving party can prevail without submitting any evidence whatsoever; it does not involve issues of whether evidence as submitted is sufficient to create a triable factual dispute.

B. The Fifth Circuit Improperly Shifted the Summary Judgment Burden to Arthur Young.

The decision below not only failed to hold BNO to the appropriate standard of Rule 56 as enunciated in *Celotex* and *Anderson*, but imposed a requirement on Arthur Young to negate the factual allegations contained in BNO's complaint. Rather than focusing on BNO's complete failure to present any evidence to support its claims, the panel noted that "Arthur Young did not submit or argue facts which showed that it did not conduct the audit in question or that BNO did not rely on the audit in extending the loan." (A.10a) In so ruling, the Fifth Circuit reached a result at odds with this Court's recent rulings and the mandate of Rule 56.

When BNO invoked the theory of solidary obligation to toll or interrupt prescription (in lieu of the

parties' contractual agreement on prescription), it assumed the burden of producing evidence to prove both the solidary obligation and the tolling or interruption of the statute of limitations. BNO's burden of proof was not removed merely because of Arthur Young's motion for summary judgment. As Arthur Young asserted before the Fifth Circuit, BNO was required to show, for example, a "relationship between Arthur Young and BNO" or the "falsity of Arthur Young's representations. . . .", *i.e.*, BNO was required to produce some evidence to support its claim that the obligations of Arthur Young and the other defendants were solidary and thus tolled the statute. However, by its ruling, the Fifth Circuit created the bizarre situation that, merely by bringing its motion, Arthur Young became obligated to disprove what had been BNO's burden to prove. Such a result obviously is improper.

In *Celotex* this Court stated that "we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." 106 S. Ct. at 2553 (emphasis not added) *Celotex* specifically held that a movant carried its burden on an issue on which the non-movant bears the burden, simply by pointing out the absence of *any* evidence supporting the non-movant. *Id.* at 2554; *see* Fed. R. Civ. P. 56(b). As BNO failed to produce any evidence supporting its claims and its theory of prescription interruption, the entry of summary judgment was mandated.

CONCLUSION

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses and we think it should be interpreted in a way that allows it to accomplish this

purpose." *Celotex*, 106 S.Ct. at 2553. This was thwarted in the instant case by the Fifth Circuit. Petitioner respectfully urges this Court to address the appropriate development of the standards for summary judgment and the improper erosion of this Court's recent holdings strengthening use of Rule 56. By reviewing and correcting the Fifth Circuit's clear disregard of the straightforward mandate of Rule 56 and this Court's holdings in *Celotex* and *Anderson*, the integrity and effectiveness of the most important pre-trial tool to clear congested court dockets can be preserved and reinforced.

Dated: December 7, 1987
New York, New York

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APPENDIX A

The BANK OF NEW ORLEANS AND TRUST COMPANY,
First National Bank of Commerce,
(Substituted proper party 9-21-83),

Plaintiff-Appellant,

v.

MONCO AGENCY, INC., et al., Defendants,
Arthur Young & Company,

Defendant-Appellee.

No. 86-3588

United States Court of Appeals, Fifth Circuit
Aug. 11, 1987

Appeal from the United States District Court for the Eastern District of Louisiana

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Before CLARK, Chief Judge,
BROWN, and JOHNSON, Circuit Judges.

CLARK, Chief Judge:

The Bank of New Orleans and Trust Company (BNO) appeals from the district court's summary

judgment dismissing its negligence claim against Arthur Young & Company (Arthur Young) on the ground that the claim was prescribed under Louisiana's one-year statute of limitations governing negligence actions. Finding that BNO has properly alleged that Arthur Young is liable to BNO *in solido* with other defendants who were timely sued, we hold that litigation against those defendants interrupted prescription under Louisiana law. We reverse the district court's judgment and remand for further proceedings on BNO's claim against Arthur Young.

I.

Arthur Young conducted an independent audit of Monco Agency, Inc. (Monco) and its subsidiary Cotton Belt Insurance Company (CBIC) for the fiscal year ending December 31, 1980. Monco was a holding company, and CBIC was in the bail bond and surety business. Arthur Young's 1980 financial statements showed that Monco and CBIC were solvent companies. BNO asserted before the district court that it relied on this audit report as well as in house reports representing the corporations' subsequent financial condition in extending a loan in November 1981 to Monco for over $1.6 million. BNO extended an additional loan of $500,000 to Monco in January 1982. To secure payment of these loans, Monco pledged shares of CBIC stock.

The Monco loan went into default in March 1982. By July 1982, CBIC had been adjudicated insolvent in Texas, placed in receivership in Tennessee, and faced similar measures in California as well as in other states. BNO officers met with CBIC's appointed receiver in Tennessee (CBIC's state of incorporation) who informed them that CBIC had bail bond losses estimated at $13

million. The BNO officers were also told that many of the outstanding bail bond claims were "old," dating back to February 1979.

BNO filed suit against Monco and its president and principal shareholder Oliver Montagnet on July 1, 1982, approximately three and one half-months after it first learned of CBIC's difficulties and had reason to be concerned over the Monco loan. BNO alleged violations of federal securities laws[1] and the Louisiana Blue Sky Laws[2] on the ground that it had extended loans in excess of $2.1 million to Monco in reliance on Monco's and Montagnet's misstatements and omissions of material fact concerning the operations of Monco's wholly owned subsidiary CBIC.

In August 1983, BNO and Arthur Young negotiated an agreement whereby any subsequent action brought by BNO against Arthur Young in connection with the 1980 audit report would be deemed filed as of August 10, 1983. BNO filed a third amended complaint in May 1984 naming Arthur Young as an additional defendant and seeking to hold Arthur Young liable *in solido* for its losses as a result of the Monco loan. BNO alleged that Arthur

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1 BNO alleged violations of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, including Rule 10b-5, 17 C.F.R. § 240.10b-5, as well as § 12(2) and § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a). The district court dismissed the securities fraud claim based on § 17(a) of the 1933 Act at the outset.

2 BNO alleged violations under the former La.Rev.Stat.Ann. § 51.715, which was amended in 1985. *See* La.Rev.Stat.Ann. § 51.714 (West Supp. 1987). The Louisiana Blue Sky Law is now simply entitled "Louisiana Securities Law." *See* La.Rev.Stat.Ann. §§ 51.701-24 (West Supp. 1987)

Young was negligent in failing to conduct the 1980 audit in accordance with generally accepted auditing standards, which would have revealed that CBIC was in financial difficulty arising out of its bail bond activities in several states. BNO alleged that CBIC was in fact insolvent as of December 31, 1980, contrary to Arthur Young's 1980 audit report. BNO further alleged that it relied on Arthur Young's financial statements as well as Monco's in-house reports in extending over $2.1 million in loans to Monco.

Arthur Young moved for summary judgment, arguing that BNO's professional malpractice claim was prescribed under Louisiana's one year statute of limitations for such a claim. *See* La. Civ. Code Ann. art. 3492 (West Supp. 1987).[3] Arthur Young asserted that BNO knew or should have known of a potential negligence claim against Arthur Young on the basis of misleading or false information in the 1980 audit report over a year before the stipulated filing date of BNO's action against Arthur Young. BNO responded that it did not have constructive or actual knowledge of a potential claim against Arthur Young arising from the 1980 audit until early 1983. BNO also asserted that it was seeking to hold Arthur Young liable *in solido* with Monco and Montagnet, and that timely suit against those defendants interrupted prescription as to Arthur Young. The district court agreed with Arthur Young that BNO had constructive knowledge of a potential negligence claim before August 10, 1982. The court also held that

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3 Article 3492 provides that "[d]elictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained." The concept of delictual liability under Louisiana law includes negligence.

prescription was not interrupted on the basis of *in solido* liability.

II.

BNO makes the two arguments on appeal which it urged before the district court: 1) since it seeks to hold Arthur Young liable *in solido* with other defendants who were timely sued, prescription was interrupted; and 2) it did not have actual or constructive knowledge of a potential claim against Arthur Young until after August 10, 1982.

Arthur Young raises three arguments against interrupting prescription on the basis of *in solido* liability. First, Arthur Young contends that the August 1983 prescription agreement between BNO and Arthur Young precludes a finding of interruption on the basis of BNO's timely July 1982 suit since BNO expressly agreed to deem August 10, 1983 as the filing date. Second, Arthur Young contends BNO's position that timely suit against alleged solidary obligors interrupted prescription was not properly raised in the pleadings in the district court. And third, Arthur Young claims that solidary liability is not available as a matter of law in this case.

A.

The August 1983 prescription agreement provides in pertinent part:

> In consideration of foregoing the filing of suit at this time by the Bank of New Orleans and Trust Company, Arthur Young & Company agrees to treat any action brought by or on behalf of the Bank of New Orleans and Trust Company

> or its successor in interest, First National Bank of Commerce, in connection with Arthur Young & Company's audit of and report of the consolidated financial statements of Monco Agency, Inc. for the period ended December 31, 1980, as having been brought as of August 10, 1983. . . .

Arthur Young argues that the wording of this agreement is unambiguous, that any suit brought by BNO in connection with Arthur Young's 1980 audit of Monco would be treated "as having been brought as of August 10, 1983." Arthur Young contends that this agreement supercedes BNO's attempt to append an exception that prescription was interrupted by the filing of an earlier, timely suit against solidary obligors. Arthur Young further submits that Louisiana law supports the enforcement of parties' agreements concerning prescription. *See, e.g., McDermott, Inc. v. M-Electric & Construction Co.*, 496 So.2d 1105, 1111-12 (La. Ct. App.1986) (upholding agreement shortening the applicable prescriptive period).

Arthur Young's reliance on Louisiana case law in this instance is unavailing. The agreement in the case at bar does not identify the applicable prescriptive period. The agreement merely stipulates the date at which a lawsuit brought by BNO against Arthur Young in connection with its 1980 audit would be deemed filed. When BNO added Arthur Young as a defendant to its lawsuit against Monco and Montagnet in May 1984, the agreement treated the addition as if it had been made on August 10, 1983. That is the entire sum and substance of the agreement. It does not discuss or consider the effect of the earlier timely lawsuit alleging fraud on the part of Monco and Montagnet. It does not purport to restrict

BEST AVA

BNO's ability to allege Arthur Young's *in solido* liability with these defendants.

B.

Arthur Young contends that BNO is precluded from asserting its solidary liability interruption theory because it did not plead it before the district court. In particular, Arthur Young claims that the one-year statute of limitations with respect to BNO's negligence claim had run on its face, since the alleged negligent audit took place in 1980 and the complaint was not filed until August 1983. To overcome this patent deficiency in pleading, Arthur Young asserts, BNO was required to allege with specificity its position that prescription was interrupted by the timely June 1982 filing.

BNO did, in fact plead Arthur Young's solidary liability in the third amended complaint's prayer for relief:

> WHEREFORE, plaintiff, The Bank of New Orleans and Trust Company, prays:
>
> (A) For judgment . . . in favor of plaintiff, First National Bank of Commerce, and against defendants, (Monco, Montagnet and others) and Arthur Young and Company, *jointly, severally, and in solido* rescinding plaintiff's purchase of securities alleged herein and awarding plaintiff, on account of said recission [sic], the sum of $2,138,111.10. . . . [emphasis added]

BNO repeated this allegation of solidary liability in the following paragraph (B), stating an alternative theory of recovery.

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Arthur Young submits that this pleading is deficient since a prayer for relief is not a part of the cause of action itself and does not supplement the facts alleged in the body of the complaint. *See, e.g., WiCO Corp. v. Willis Industries*, 567 F. Supp. 352, 355 (N.D. Ill. 1983). This is wrong on two counts. First, the Federal Rules of Civil Procedure are based on the concept of "notice pleadings." *See* Wright & Miller, 5 Federal Practice and Procedure: Civil § 1202 (1969). Technicalities and pleading niceties give way to substance. Fed.R.Civ.P. 1 and 8(a). Second, Arthur Young's position ignores the fact that BNO's prayer for relief is a product of the facts alleged in preceding paragraphs. The omission of the words "solidary liability" in the part of the complaint which addressed Arthur Young's role in BNO's extension of credit to Monco and the resulting monetary loss did not detract from the overall thrust of the allegations. The facts alleged in the body of the complaint combined with the specific allegation of solidary liability in the prayer for relief were sufficient to put the court and Arthur Young on notice that BNO was seeking to hold Arthur Young liable *in solido* with Monco and Montagnet.

If BNO had failed to expressly plead its prescription interruption theory in specific terms in the third amended complaint it would not be precluded from asserting its claim before the district court. Arthur Young relies on *Mann v. Adams Realty Co.*, 556 F.2d 288 (5th Cir. 1977), for the proposition that a complaint fails to state a claim upon which relief can be granted if it shows on its face that prescription has run. Mann recognizes that a Rule 12(b)(6) motion to dismiss for failure to state a claim, *see* Fed.R.Civ.P. 12(b)(6), is an appropriate method for raising the affirmative defense of prescription. *Mann*, 556 F.2d at 293. This case, however, does not represent a Rule 12(b)(6) issue. Arthur Young did not even move for a Rule

12(b)(6) dismissal.[4] If it had, the parties could have addressed the prescription issue in that context. However, the factual issue as to when BNO had constructive knowledge of a potential claim against Arthur Young was not one that could be readily resolved at that stage of the proceedings. Indeed, this very issue was contested through the discovery process for over two years before the district court's summary judgment in favor of Arthur Young. No procedural impediment precluded the district court from further considering BNO's alternative argument--which BNO asserted in memoranda submitted in response to Arthur Young's motion for summary judgment--that prescription was interrupted on the basis of the earlier, timely suit filed against Arthur Young's alleged solidary obligors. The issue of interruption was expressly raised, the parties briefed and argued the issue before the district court, and that court decided the matter on the merits. The issue was properly raised below and preserved for review on appeal.

Alternatively, Arthur Young contends that BNO did not satisfy its burden under Fed.R.Civ.P. 56 of submitting evidence with respect to Arthur Young's concurrent fault and solidary liability at the summary judgment stage. Arthur Young submits that BNO was required to go "beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (quoting Rule 56(e)).

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4 Arthur Young did move for dismissal on jurisdictional grounds. Arthur Young also immediately raised a prescription defense, moving for summary judgment and/or judgment on the pleadings. Under Fed.R.Civ.P. 12(c), a motion for judgment on the pleadings is treated as a summary judgment motion under Fed.R.Civ.P. 56.

Whether Arthur Young is liable *in solido* with the other defendants for BNO's loss is the ultimate issue in this case, and in the district court BNO must prove that Arthur Young's negligence played a part in causing its loss on the Monco loan. The focus of Arthur Young's summary judgment motion, however, was not factual liability. Arthur Young did not submit or argue facts which showed that it did not conduct the audit in question or that BNO did not rely on the audit in extending the loan. Arthur Young asserted instead that BNO's claim was prescribed on the basis of BNO's constructive knowledge of a potential claim before August 1982. BNO's position that prescription was interrupted was raised in response to Arthur Young's affirmative defense that the statute of limitations had run and was based on factual assertions in pleadings and memoranda.

BNO did not fail to sustain its summary judgment burden. It properly raised the argument that prescription was interrupted on the basis of the earlier, timely suit against Monco and Montagnet as alleged solidary obligors. Arthur Young argues, however, the BNO has failed to show a "relationship between Arthur Young and BNO" or the falsity of Arthur Young's representations in the 1980 audit. These assertions that BNO must prove solidary liability at the summary judgment stage erroneously would impose a burden on BNO to prove its negligence case before trial.

C.

BNO's challenge to the district court's holding that prescription was not interrupted claims that both Arthur Young and the defendants sued in July 1982 are liable to BNO for the same loss on the Monco loan and thus are liable *in solido*.

Arthur Young does not dispute the fact that the filing of suit against a solidary obligor interrupts prescription with regard to all other solidary obligors. *See* La.Civ. Code Ann. art. 2097, revised as La.Civ. Code Ann. art. 1799 (West Supp. 1987).[5] Rather, Arthur Young simply argues that it cannot be held solidarily liable as a matter of law.

Article 2324 of the Civil Code provides that "[p]ersons whose concurring fault has caused injury, death or loss to another are also answerable, *in solido*," La.Civ. Code Ann. art. 2324 (West Supp. 1987). In addition, article 2091, in effect at the time in question, provided "[t]here is an obligation *in solido* on the part of the debtors, when

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5 Article 2097 provided:
A suit brought against one of the debtors in solido interrupts prescription with regard to all.
La.Civ. Code Ann. art. 2097. This article was in effect at the time BNO first brought suit against Monco and Montagnet as well as when it sought to join Arthur Young to that suit. Art. 2097 has since been revised:
The interruption of prescription against one solidary obligor is effective against all solidary obligors and their heirs.
La.Civ. Code Ann. art. 1799 (West Supp. 1987). Art. 1799 expands the old art. 2097 to give interruptive effect to acts other than the filing of suit. Suit was filed here, so the articles do not differ materially for our purposes.

they are all obliged to the same thing, so that each may be compelled for the whole. . . . " La.Civ. Code Ann. art. 2091.[6]

BNO's allegations before the district court satisfy either definition of solidary liability provided in the Civil Code. BNO alleged that Monco and Montagnet made false statements or omissions of material fact concerning the financial condition of Monco and CBIC in connection with loan negotiations in 1981 between Monco and BNO. In May of 1981, Arthur Young issued the audit report for the fiscal year ending December 31, 1980. BNO alleged that, had Arthur Young properly audited Monco and CBIC and issued financial statements reflecting the true financial condition of Monco and CBIC, the misstatements in Monco's in-house reports the following year could not have occurred; that Monco and Montagnet used the erroneous audit report to misrepresent Monco's and CBIC's financial condition in 1981; that it relied both on Arthur Young's report and the ensuing in-house reports, which combined to cause BNO's loss of over $2.1 million.

BNO asserts that the "concurring fault" of Monco, Montagnet, and Arthur Young caused this loss. All defendants are liable to BNO for the "same thing"--BNO's loss as a result of the Monco loan. Under BNO's theory of the case, all defendants are solidary obligors. Full

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6 Old Article 2091 is now revised as new article 1794:
An obligation is solidary for the obligors when each obligor is liable for the whole performance. A performance rendered by one of the solidary obligors relieves the others of liability toward the obligee.
La.Civ. Code Ann. art. 1794 (West Supp. 1987). The revision does not change the law.

performance by one solidary obligor here would relieve the others of liability to BNO. *See Billiot v. American Hospital Supply Corp.*, 721 F. 2d 512, 513-14 (5th cir. 1983) (applying articles 2324 and 2091, court finds that negligent physician and manufacturer of defectively designed product may be deemed solidary obligors for purposes of interrupting prescription).

Arthur Young counters that BNO's claims against Monco and Montagnet were based on federal and state securities laws and that BNO's claim against Arthur Young, conversely, is grounded on negligence under the Civil Code. Arthur Young contends that since federal law governs BNO's federal securities claims, there can be no solidary obligation under Louisiana law. Similarly, Arthur Young urges that Louisiana's Blue Sky statute is not a part of the Civil Code and that therefore the general solidary obligor provisions in the Civil Code do not encompass securities law violations. Arthur Young further reads the Louisiana Blue Sky statute, *see* La. Rev.Stat.Ann §51.714 (West Supp. 1987)[7] as limiting the class of wrongdoers who may be held liable for state securities violations.

Arthur Young has cited no authority for its position that BNO was required to sue the initial defendants under

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7 Section 51.714 is a revision of old § 51.715, which was in effect at the time BNO sued Arthur Young. Section 51:715 provided:
B. Every person who directly or indirectly controls a seller liable under Subsection (A), every partner, officer, or director of such a seller, every person occupying a similar status or performing similar functions, every employee of such a seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller. . . .

the Civil Code in order to interrupt prescription as to the negligence claim against it. There is no basis in logic or law for requiring that the source of liability be found in the Civil Code and sued upon pursuant to a specific codal authority before such liability may be deemed joint, several, or *in solido* with that of others. Indeed, La.Civ.Code Ann. art. 1797 (West 1987) provides: "An obligation may be solidary though it derives from a different source for each obligor." Moreover, the Louisiana Blue Sky Law does not exclude categories of persons as potential solidary obligors; rather, it provides that persons such as "general partners," and "officers" who control the defendant seller shall be "jointly and severally" liable. The Blue Sky Law merely provides a statutory cause of action for securities fraud. It does not effect the character of that fraud for purposes of classification under the Louisiana Civil Code.

Arthur Young contends that Monco and Montagnet and Arthur young are not "obligated to the same thing." Arthur Young submits that Monco and Montagnet were sued for rescission--in other words, to void the contract and recover the money BNO loaned to Monco in exchange for pledged CBIC stock--while Arthur Young was sued for mere negligence in preparing the 1980 audit. Arthur Young claims that since it was not a party to the loan transaction it could never be held liable for rescission, to void the Monco loan contract, or to return the consideration paid for the CBIC stock. Arthur Young misses the point. One thing BNO seeks is to recover damages sustained as a result of the Monco loan default. While different theories of recovery are asserted as to Monco and Montagnet, all defendants are allegedly obligated to the same thing insofar as recovery of the loan loss is concerned. Recovery of the loan loss damages against either Monco and Montagnet or Arthur Young

under any theory would satisfy this common demand as to all defendants.

Arthur Young contends that solidary liability is not applicable because Monco and Montagnet were sued for fraud and Arthur Young was not. There is no impediment to holding one fraudulent defendant and one "merely" negligent defendant liable *in solido* when their concurrent fault has caused a single loss if they are obligated for the same thing. As this court observed in *Equilease Corp. v. Smith International, Inc.*, 588 F.2d 919, 929 (5th Cir. 1979):

> Logically, a party may be held individually liable for negligence whether the damage caused to the plaintiff takes the form of fraud or bodily injury. And we perceive no impediment to binding a defendant who acts negligently *in solido* with those who commit an intentional tort when the same harm to the plaintiff results, provided, of course, that each party is legally at fault.

Here the same harm to BNO has resulted from BNO's asserted intentional fraud on the part of Monco and Montagnet and negligent accounting practices on the part of Arthur Young.

Arthur Young relies on the Louisiana Third Circuit's recent decision in *Bertrand v. St. Paul Fire and Marine Ins. Co.*, 491 So.2d 474 (La.App. 3d Cir.), *cert. denied*, 494 So. 2d 541, 543 (La.1986), in which the court rejected interruption of prescription of an action against an alleged solidary obligor in circumstances Arthur Young says are analogous to those in its case. In *Bertrand*, an action was brought to enjoin a hospital and physicians from destroying evidence surrounding the death of a

patient. Following the date on which a medical malpractice action would have prescribed, the original complaint was amended to include malpractice claims against the original defendants and one additional physician, who was named for the first time. The state appellate court held that the amendment related back and thus exempted the plaintiff's claims against the originally named defendants from prescription; however, the court also held that the amendment did not relate back with respect to the physician named for the first time. The court rejected the argument that prescription was interrupted by the original action seeking injunctive relief against the physician's alleged solidary obligors.

Arthur Young submits that the Louisiana court refused to allow interruption as to this physician because "there was no pleading filed putting him on notice that some form of judicial relief was being sought arising from his participation in the events surrounding Bertrand's death, and putting him on notice that his evidence concerning it should be collected and preserved." *Id.* at 481. By analogy, Arthur Young contends that the fraud claims against Monco and Montagnet could not have put it on notice of a possible negligence action against it in regard to the 1980 audit.

Arthur Young's reliance on *Bertrand* to define sufficient notice with respect to Louisiana prescription is misplaced. *Bertrand* determined that the amendment adding a malpractice claim did not relate back so as to permit the claim against the newly named defendant. Solidary liability was not the issue. The Louisiana court refused to interrupt prescription because article 2097 required a timely *suit* against a solidary obligor to interrupt prescription as to another. In *Bertrand*, there never was a timely malpractice suit. The untimely

malpractice amendment could not relate back to the earlier filed injunction action. The relief being sought in the initial action--preservation of evidence--did not demand the same thing--damages stemming from a patient's death due to medical malpractice. Arthur Young, on the other hand, knew or could have known from the date of the initial action that BNO was seeking to recover its loss on the Monco loan. Timely suit against an alleged solidary obligor which was jointly liable for that loss put Arthur Young "on notice" for purposes of interrupting prescription.

Arthur Young contends that its fault was not concurrent with that of Monco and Montagnet. Arthur Young asserts that fraudulent and negligent acts can never be concurrent under article 2324 of the Louisiana Civil Code. Article 3556 of the Louisiana Civil Code states that there are three degrees of fault: the gross, the slight, and the very slight. "The *gross* fault is that which proceeds from inexcusable negligence or ignorance; it is considered as nearly equal to fraud." La. Civ. Code Ann. art. 3556. To equate fraud with negligence is to ignore these defined degrees of fault. This truism is immaterial in the present setting.

Article 2324 speaks of "concurring fault." It does not consider degrees of fault. Under this court's reasoning in *Equilease* fraud can concur with negligence:

> In Louisiana, the basis of all delictual recovery is fault. The notion of fault encompasses, besides the doing of an unlawful act, both the intentional harming of another (*dolus*) and the negligent harming of another (*culpa*). *See* Stone, *Tort Doctrine in Louisiana:*

The Concept of Fault, 27 Tul.L.Rev. 1, 8-13 (1952).

> True, imposing solidary liability on co-delinquents, when one has committed a willful harm and the other a negligent one, may lead to inequitable results if there is no apportionment of fault between the defendants. The one who is negligent is rarely equally at fault with the one who intends to harm. But the same inequity results when one tortfeasor is grossly negligent and the other is only slightly negligent. The remedy lies in regulating contribution rather than limiting the ambit of Article 2324.

588 F.2d at 929 n. 12. Similarly, we hold that article 2324 encompasses both fault that takes the form of willful harm and negligence. *See Billiot*, 721 F.2d at 513-14 (combining negligence and product liability is to the same effect).

Finally, Arthur Young makes reference to the ground on which the district court apparently determined that Arthur Young and the other defendants could not be solidary obligors: because Arthur Young could not be liable to Monco and Montagnet for contribution under the federal securities laws as joint tortfeasors. Again, Arthur Young advances a correct statement of law which has no applicability to the present issue. Monco and Montagnet as intentional tortfeasors could not seek contribution from Arthur Young as a negligent party. However, the determinative inquiry under the Louisiana Civil Code is not the right to contribution, but whether the concurring fault of all three defendants caused BNO's loss and whether all defendants are obligated to the same thing.

Arthur Young is clearly not liable for the alleged fraud, but BNO is not precluded from seeking to hold it responsible *in solido* for its role in conducting the allegedly improper audit which enabled Montagnet and Monco to perpetrate that fraud and allegedly concurred to cause BNO's loss.

III.

BNO has properly alleged that Arthur Young is liable *in solido* for its negligence in connection with the 1980 audit and representations of Monco's and CBIC's financial condition. The timely June 1982 suit against alleged solidary obligors Monco and Montagnet thus interrupted prescription with regard to Arthur Young. We hold only that prescription was interrupted as a matter of law. We express no opinion as to whether BNO had constructive knowledge of a potential claim against Arthur Young before August 10, 1983. Obviously, we express no view on the merits of the claims asserted. The district court's judgment dismissing BNO's claim against Arthur Young is

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3588

THE BANK OF NEW ORLEANS
AND TRUST COMPANY,

FIRST NATIONAL BANK OF COMMERCE,
(Substituted proper party 9-21-83)

Plaintiff-Appellant,

VERSUS

MONCO AGENCY, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District
Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(October 22, 1987)

Before CLARK, Chief Judge, BROWN, and JOHNSON, Circuit Judges.

BY THE COURT:

The petition for rehearing filed by Arthur Young and Company on August 25, 1987 is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF LOUISIANA

Rule 3.10

Opposition to Summary Judgment. Each copy of the papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried, in addition to the material required by Rule 3.7. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required of the opposing party.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE BANK OF NEW ORLEANS AND TRUST COMPANY,	*	CIVIL ACTION
	*	NO. 82-2758
	*	SECTION "I"
Plaintiff	*	MAG. DIV. 4
	*	
VERSUS	*	
	*	
MONCO AGENCY, INC., ET AL.,	*	
	*	
Defendants	*	
* * * * * *	*	
	*	
CONSOLIDATED WITH	*	
	*	
DAVID BROEMEL, SPECIAL DEPUTY COMMISSIONER OF INSURANCE OF THE STATE OF TENNESSEE,	*	CIVIL ACTION
	*	NO. 83-2926
	*	SECTION "I"
	*	MAG. DIV. 2
	*	
Plaintiff	*	
	*	
VERSUS	*	
	*	
MONCO AGENCY, INC., ET AL.,	*	
	*	
Defendants	*	
* * * * * *	*	

LOCAL RULE 3.10 STATEMENT OF
MATERIAL FACTS AS TO WHICH THERE EXISTS
A GENUINE ISSUE TO BE TRIED

NOW INTO COURT, through undersigned counsel, comes plaintiff, First National Bank of Commerce ("FNBC"), and, pursuant to Local Rule 3.10, submits the following statements of material fact at to which there exists a genuine issue to be tried:

1. Whether the acts and omissions of the individual defendants, in concert with the fault and negligence of AYC resulted in the $2.1 million loss by BNO.

2. Whether BNO's suspicions that the officers and directors of Monco Agency, Inc. ("Monco") had supplied false and misleading "in-house" financial statements to BNO should have put BNO on notice that the 1980 audit report issued by Arthur Young & Company, a "Big Eight" accounting firm, was false and materially misleading.

3. Whether, based on the facts then known to The Bank of New Orleans and Trust Company ("BNO"), BNO knew or had reasonable grounds to believe that the AYC audit report was materially misleading and inaccurate.

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Boisfontaine, Nathan & Winn
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Attorneys for First National
Bank of Commerce

NO. 87-938

Supreme Court, U.S.
FILED
JAN 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARTHUR YOUNG & COMPANY,

Petitioner,

versus

THE BANK OF NEW ORLEANS AND TRUST COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR
RESPONDENT
THE BANK OF NEW ORLEANS
AND TRUST COMPANY

QUESTION PRESENTED*

Is a movant entitled to entry of summary judgment in its favor when, contrary to Fed. R. Civ. P. 56, it fails to discharge its burden of production by either submitting evidence that negates an essential element of the nonmoving party's claim or by demonstrating that the nonmoving party's evidence is insufficient to establish an essential element of its claim?

*Pursuant to Supreme Court Rule 34.2, respondent submits this Question Presented because petitioner's Questions Presented are misleading insofar as they suggest that a party moving for summary judgment may shift the evidentiary burden of proof on an issue which has been raised by the non-mover but which movant does not discuss in its motion for summary judgment.

LIST OF PARTIES

Respondent herein, The Bank of New Orleans and Trust Company ("BNO"), was a Louisiana banking corporation which merged with First National Bank of Commerce, a national banking corporation. First National Bank of Commerce, as successor in interest to BNO, was substituted in the district court as the proper party plaintiff to this proceeding. For purpose of clarity, however, respondent will be referred to as "BNO" throughout this brief.

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NO. 87-938

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

ARTHUR YOUNG & COMPANY,
Petitioner,

versus

THE BANK OF NEW ORLEANS AND TRUST COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent herein, The Bank of New Orleans and Trust Company ("BNO"), respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed herein by Arthur Young & Company ("Arthur Young").

I. STATEMENT OF THE CASE

On July 1, 1982, BNO filed suit against Monco Agency, Inc. ("Monco") and Monco's president and principal shareholder, Oliver S. Montagnet, Jr. ("Montagnet"), alleging that it had extended loans in excess of 2.1 million dollars to Monco based on Monco and Montagnet's misstatements and omissions of material fact concerning the operations of Cottonbelt Insurance Company ("CBIC"), a wholly owned

subsidiary of Monco. BNO alleged that Monco and Montagnet had violated both the federal securities laws and the Louisiana Blue Sky Law. By way of amending complaint filed on May 31, 1984, BNO filed suit against Arthur Young alleging that Arthur Young, as the independent auditor of Monco and CBIC, had negligently conducted the audit for the year 1980 and had issued a misleading audit report upon which BNO relied in extending credit to Monco. BNO further alleged that Arthur Young's negligence was a direct and proximate cause of the loss incurred by BNO in excess of $2,000,000.00. BNO prayed for judgment against Monco, Montagnet and Arthur Young *in solido*[1] for the full amount of the bank's loss.

Arthur Young moved for summary judgment arguing that BNO's malpractice claim was prescribed under Louisiana's one year statute of limitations[2] because BNO had constructive or actual knowledge of a claim against Arthur Young in excess of one year prior to suit being filed against Arthur Young. It was this issue *only* which Arthur Young briefed and which Arthur Young submitted record evidence concerning. Nowhere in Arthur Young's initial summary judgment pleadings, affidavits or exhibits, did it address the issue of its solidary liability with Monco and Montagnet who were sued within a year of the default on the Monco loans. Thus, in its motion for summary judgment, Arthur Young did not address the Louisiana rule of law that timely suit against one solidary party interrupts prescription against all solidary

1. Under Louisiana law, an obligation is solidary when each obligor is liable for the whole performance. *See* La. Civ. Code arts. 1794 and 2324 (West Supp. 1987).

2. *See* La. Civ. Code art. 3492 (West Supp. 1987).

parties.[3] *See* La. Civ. Code arts. 1799 and 3503 (West Supp. 1987).

In opposition to Arthur Young's motion for summary judgment, BNO presented sworn deposition testimony reflecting that the bank did not have constructive or actual knowledge of a claim against Arthur Young more than one year prior to the filing of suit. *In addition*, BNO pointed out that it had sued Arthur Young as a solidary obligor with Monco and Montagnet, who were timely sued, and therefore prescription as to Arthur Young was interrupted. It was only in its reply memorandum in support of its motion for summary judgment that Arthur Young even mentioned its liability *in solido* with Monco and Montagnet. Even then, Arthur Young submitted no evidence whatsoever negating its solidary liability with Monco and Montagnet, but rather argued that as a matter of law there could not be a finding of solidary liability. Thus, at the trial court level, Arthur Young never treated the issue of its solidary liability as a factual issue. Indeed, neither did the district court which ruled, erroneously, that as a matter of law a negligent party could not be held *in solido* with a fraudulent party.

It was this *legal* issue[4] which BNO appealed to the United States Court of Appeals for the Fifth Circuit and which was

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3. Indeed, Arthur Young does not challenge that rule of law in its Petition to this Court. *See* Petitioner's Brief at 6-7, n.5.

4. The district court also ruled that BNO had constructive knowledge of Arthur Young's negligence prior to one year before suit was filed against Arthur Young. The Fifth Circuit did not reach this issue on appeal and that issue is not before this Court.

the basis for the Fifth Circuit's reversal of the district court's ruling:

> Arthur Young does not dispute the fact that the filing of suit against a solidary obligor interrupts prescription with regard to all other solidary obligors. . . . Rather, Arthur Young simply argues that it cannot be held solidarily liable *as a matter of law*. (Petitioner's Appendix at 11a) (emphasis added).

The Fifth Circuit ruled that there is no impediment to holding a fraudulent defendant (Monco and Montagnet) liable *in solido* with a negligent defendant (Arthur Young) when their concurrent fault has caused a single loss to the plaintiff. (Petitioner's Appendix at 15a). As a result, the Fifth Circuit found that BNO had properly alleged that Arthur Young was liable *in solido* for its negligence in connection with the audit of Monco and CBIC, and the timely filed suit against Monco and Montagnet interrupted prescription against Arthur Young as a *matter of law*. (Petitioner's Appendix at 19a).

II. SUMMARY OF ARGUMENT

While it is true that a non-movant who bears the burden of proof at trial must do more than rest on its pleadings in response to a properly confected motion for summary judment, such a burden is only shifted to the non-movant *after* the movant has discharged its initial burden of production. The moving party in a motion for summary judgment always bears the initial burden of demonstrating the absence of a genuine issue of material fact, and unless and until the movant has satisfied this burden the motion is not properly brought and the movant is not entitled to summary judgment regardless of which party bears the burden of proof at trial.

Arthur Young argues that BNO failed to submit any evidence of proof on the issue of solidary liability, an issue which BNO will bear the burden of proof at trial, and therefore it is entitled to judgment in its favor under *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986). Arthur Young ignores, however, the initial burden of production which Rule 56, Fed. R. Civ. P., and *Celotex* demand of all movants, and which it did not discharge at the time it brought its motion for summary judgment. Since petitioner failed to satisfy this burden of production, BNO was not required to submit any evidentiary proof regarding the issue of solidary liability, and, as a result, the Fifth Circuit, in accordance with *Celotex*, properly ruled that Arthur Young's motion for summary judgment should not have been granted.

III. ARGUMENT

THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT

A. The Party Seeking Summary Judgment Always Bears The Initial Burden Of Demonstrating The Absence Of A Genuine Issue Of Material Fact.

In petitioning this Honorable Court, Arthur Young principally relies on the decision in *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986), wherein the Court clarified the appropriate standard for a motion for summary judgment. Arthur Young cites *Celotex* for the proposition that where a nonmoving party will bear the burden of proof at trial on a dispositive issue, that party is required to go beyond the allegations in the pleadings and must designate specific facts showing a genuine issue for trial. Arthur Young fails, however, to acknowledge that before the burden of proof shifts to the nonmoving party, the moving party must always satisfy the initial burden of demonstrating the absence

of a genuine issue of material fact.[5]

The Court clearly enunciated the movant's initial burden in *Celotex*:

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact. 106 S.Ct. at 2553.

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5. Arthur Young also cites the Court's decisions in *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348 (1986), in support of its argument. The Court in *Anderson*, however, did not even *reach* the issue of whether the moving party discharged its initial burden. As the Court noted:

> Our analysis here does not address the question of the initial burden of production of evidence placed by Rule 56 on the party moving for summary judgment. See *Celotex Corp. v. Catrett*, _____ U.S. _____, 106 S.Ct. _____, 90 L.Ed.2d _____ (1986). Respondents have not raised this issue here, and for the purposes of our discussion we assume that the moving party has met initially the requisite evidentiary burden. 106 S.Ct. at 2511, n.5.

Similarly, in *Matsushita*, decided prior to *Celotex*, the Court observed that a moving party does have an initial burden of production, but the issue of whether or not the moving party had discharged its initial burden was not before the Court. 106 S.Ct. at 1355, n.10.

The moving party must always discharge its burden before the non-movant is required to respond to the summary judgment motion, and the burden has not been discharged if the movant simply states that the non-movant has failed to submit any evidence on an issue:

> It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case. 106 S.Ct. at 2555 (White, J. concurring).

In the *Celotex* dissent, Justice Brennan elaborated more fully on the way in which the burden shifts between the parties to the action, as well as how the burden can be satisfied,[6] when he noted that "the burden of establishing the non-existence of a 'geniune issue' is on the party moving for summary judgment," 106 S.Ct. at 2556, and explained that the burden is composed of two distinct parts:

> [A]n initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party. *See* 10A Wright, Miller, & Kane §2727. The court need not decide whether the moving party has satisfied its ultimate burden of persuasion unless and until the Court finds that the moving party has discharged its initial burden of production. 106

6. "Although the [*Celotex*] Court issued a five to four decision, the majority and dissent both agreed as to how the summary judgment burden of proof operates; they disagreed as to how the standard was applied to the facts of the case." C. Wright, A. Miller, and M. Kane, 10A *Federal Practice and Procedure*, Section 2727, p. 21 (2d Ed. 1987 Supp.) (footnote omitted).

> S.Ct. at 2556-57 (Brennan, J. dissenting) (footnote omitted).

If the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its initial burden of production by either submitting "affirmative evidence that negates an essential element of the nonmoving party's claim" or by demonstrating to the court that "the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." 106 S.Ct. at 2557 (Brennan, J. dissenting). Should the moving party adopt the second option and seek summary judgment by demonstrating the absence of evidence in the record, its burden of production would entail more than merely stating that the non-movant has failed to submit any evidence in opposition to the summary judgment:

> Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. See *ante*, at 2551 (WHITE, J., concurring). Such a 'burden' of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. See Louis 750-751. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. *Ante*, at 2553. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories and other exchanges between

> the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the non-moving party. 106 S.Ct. at 2557-58 (Brennan, J. dissenting).

Justice Brennan concluded that "[i]f the moving party has not fully discharged this initial burden of production, its motion for summary judgment must by denied . . .". *Id.*

In *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3rd Cir. 1987), *cert. dismissed*, 108 S.Ct. 26 (1987), the Third Circuit Court of Appeals adhered to the standards outlined in *Celotex* and held that if the non-movant would bear the burden of persuasion at trial then,

> [T]he party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the nonmovant's burden of proof at trial. (Citing *Celotex*).

Similarly, the Ninth Circuit in *Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 830 F.2d 977 (9th Cir. 1987), held that the party seeking summary judgment bears the initial responsibility of informing the district court of the basis of its motion and of identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *See also Greenberg v. Food & Drug Administration*, 803 F.2d 1213 (D.C. Cir. 1986) (citing *Celotex* and holding that as a threshold matter the moving party must demonstrate the absence of evidence in the record and only after meeting this burden will the nonmoving party be required to demonstrate that an issue of material

fact does exist); *Windon Third Oil and Gas Drilling Partnership v. Federal Deposit Insurance Corporation*, 805 F.2d 342 (10th Cir. 1986), *cert. denied*, 107 S.Ct. 1605 (1987).

The fallacy of Arthur Young's argument is, therefore, that it did not discharge its burden in bringing the motion for summary judgment.[7] As discussed above, Arthur Young chose to ignore the issue of solidary liability when it moved for summary judgment and in so doing failed to comply with the requirements of Rule 56, as clarified in *Celotex*, by showing that "there is an absence of evidence" to support BNO's claim. 106 S.Ct. at 2554. As a result, the motion was not properly confected.

B. The Fifth Circuit Properly Recognized That Arthur Young & Company Failed To Discharge Its Initial Burden Of Production.

Arthur Young argues that the Fifth Circuit's ruling conflicts with *Celotex* and with the language of Rule 56(e), Fed. R. Civ. P., because "BNO needed to present sufficient evidence upon which a jury reasonably could find that Arthur Young was solidarily liable with the defendants sued in 1982, . . .", (Petitioner's Brief at 12-13), and such ab-

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7. In addition to *Celotex*, Arthur Young also relies on *Slaughter v. Allstate Ins. Co.*, 803 F.2d 857 (5th Cir. 1986); and *Fontenot v. Upjohn Co.*, 780 F.2d 1190 (5th Cir. 1986). *Slaughter* only dealt with the burden on the non-movant in response to a "proper" motion for summary judgment. In *Fontenot*, a case decided prior to *Celotex*, the Fifth Circuit noted that the movant may not simply show that the plaintiff has failed to submit any evidence in support of its claim, but that the movant must go further and is required to "establish" the absence of material fact.

sence of proof requires a reversal of the Fifth Circuit decision.[8] Arthur Young, however, has failed to show that it ever satisfied its own initial mandatory burden of production. This fact was recognized by the Fifth Circuit when it stated:

> Whether Arthur Young is liable *in solido* with the other defendants for BNO's loss is the ultimate issue in this case, and in the district court BNO must prove that Arthur Young's negligence played a part in causing its loss on the Monco loan. The focus of Arthur Young's summary judgment motion, however, was not factual liability. *Arthur Young did not submit or argue facts which showed that it did not conduct the audit in question or that BNO did not rely on the audit in extending the loan.* (Petitioner's Appendix at 10a) (emphasis added).

Thus, in its brief filed with this Court, Arthur Young does not even *address* its initial burden. Instead it argues that since BNO is a nonmoving party with the burden of proof at trial, *it* must submit evidence "sufficient to create a triable factual dispute." (Petitioner's Brief at 14). This argument is legally and factually incorrect. In its motion for summary judgment Arthur Young confined its argument and proof to the issue of whether BNO had actual or constructive

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8. Arthur Yong cites *Hilbun v. Goldberg*, 823 F.2d 881 (5th Cir. 1987), for the proposition that solidary liability must be proved and cites *Moor v. Travelers Insurance Co.*, 784 F.2d 632 (5th Cir. 1986); and *United Klans of America v. McGovern*, 621 F.2d 152 (5th Cir. 1980), for the proposition that a party asserting a tolling theory of prescription bears the burden of proof. BNO does not disagree with the holdings of these cases, but rather contends that no such burden has been shifted to BNO in the summary judgment proceeding, since Arthur Young failed to discharge its initial burden of production.

knowledge of the potential claim against Arthur Young more than one year prior to the filing of suit. BNO responded to the motion by filing affidavits and submitting evidence demonstrating that it did not have constructive knowledge of such a claim, *and* by showing that Arthur Young was sued as a solidary obligor with other timely sued defendants and therefore prescription was interrupted as to Arthur Young. In its reply memorandum in support of its motion, Arthur Young *only* addressed the *legal* significance of BNO's solidary liability theory:

> Reply is necessary because the *in solido* theory offered by BNO to avoid the prescription bar does not and cannot apply here as a *matter of law*. (Petitioner's Reply Memorandum in Support of its Motion for Summary Judgment at p. 1) (emphasis added).

Petitioner *has never* argued that it was not *factually* liable *in solido* with Monco, only that *as a matter of law* it could not be held liable *in solido*. Clearly, no burden of production could have been discharged at the district court level when Arthur Young did not even address the question of whether it was solidarily liable with Monco and Montagnet. Arthur Young has never come forward and identified portions of the record which would demonstrate that it is not solidarily liable,[9] and therefore in no way affirmatively discharged its burden of production. Instead, it merely contends that

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9. It is submitted that Arthur Young did not make that argument or submit factual evidence negating its solidary liability because it knew there was record evidence establishing Monco and Montagnet's fraud (false financial statement provided to BNO) as well as establishing Arthur Young's negligence in the conduct of the audit of Monco and CBIC (failure to detect and reserve for huge losses experienced by CBIC).

BNO has failed to offer any evidence which would prove the solidary liability theory. Again, Arthur Young may not shift the burden of proof to BNO without first making the requisite showing of the absence of a genuine issue of material fact.

The Fifth Circuit, in finding that Arthur Young had not raised the issue of solidary liability and thereby had not negated such a basis for its liability, found that Arthur Young had not carried its initial burden of proof and therefore "BNO did not fail to sustain its summary judgment burden." (Petitioner's Appendix at 10a).

Clearly, the Fifth Circuit's ruling in no way conflicts with the Court's decision in *Celotex*. In this case, from the district court level through its Petition to this Court, Arthur Young has entirely failed to present evidence negating its solidary liability, and has thereby totally ignored its burden of proof in bringing its motion for summary judgment. For this reason, the decision of the Fifth Circuit is proper and is in full accord with the holding of *Celotex*.

IV. CONCLUSION

Arthur Young, in bringing its motion for summary judgment, failed to carry its burden of demonstrating the absence of a genuine issue of material fact. Its motion was, therefore, not properly confected, and as a matter of law it was not entitled to summary judgment under Rule 56. The Fifth Circuit properly recognized that fact and overruled the district court's ruling granting the motion.

Because the Fifth Circuit's ruling is a correct application of Rule 56 and this Court's holding in *Celotex*, it is respectfully submitted that this Honorable Court should deny the Petition for Writ of Certiorari.

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No. 87-938

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ARTHUR YOUNG & COMPANY,
Petitioner,

- v. -

THE BANK OF NEW ORLEANS AND TRUST CO.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY MEMORANDUM

I. PRELIMINARY STATEMENT

When respondent's arguments are parsed, it is evident that they demonstrate a need for granting this writ of certiorari. The issue, so sharply put in focus by respondent's brief in opposition ("Opp. Br."), is extremely narrow yet it has widespread significance concerning the effective administration of Rule 56. Succinctly put, in what circumstances is a movant deemed to have met its initial burden so as to shift the burden to go forward to the nonmovant?

Here, petitioner demonstrated that the complaint was time-barred on its face -- thus, establishing its *prima facie* case. However, both the Fifth Circuit and respondent erroneously maintain that the establishment of a *prima facie* case is not enough and that a movant must go further and also negate all possible "defenses" that respondent might conjure up.

The decision thus reaches well beyond cases involving the particular aspect of Louisiana solidary liability at issue here, and has broad application to all cases involving the affirmative pleading by a party of a condition enabling or entitling a claim to proceed when the party seeking summary judgment has demonstrated from the face of the pleading (or otherwise) that the claim is defective. Such cases routinely involve issues as diverse as a plaintiff's invocation of the long-established federal equitable tolling doctrine or damages suits against government entities after filing a notice of claim or exhausting administrative remedies. *See, e.g., Holmberg v. Armbrecht*, 327 U.S. 392 (1946) (federal equitable tolling doctrine).

Thus, to use a typical example indistinguishable from this case and which is common in the federal courts, a plaintiff invoking the federal equitable tolling doctrine to avoid a statute of limitations bar has the burden of pleading and proving the doctrine. *E.g., Hupp v. Gray*, 500 F.2d 993 (7th Cir. 1974); *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248 (9th Cir. 1978). Absent such allegation and proof, the claim is time-barred on the face of the pleading and the defendant is entitled to judgment as a matter of law. The Fifth Circuit decision would place the burden on a defendant at the summary judgment stage to negate or disprove the facts upon which the tolling doctrine presumably is based -- even before the

plaintiff invoking the doctrine has shown any evidence exists to support the theory and despite the plain fact that the filing date itself establishes a *prima facie* limitations bar on the face of the pleading.

This result hardly comports with established precedent requiring the party seeking to toll the statute of limitations to plead *and* prove the doctrine. In these and like cases, the Fifth Circuit's decision will thus have great impact, the significance of which requires careful consideration by the Court. The broad reading of the Fifth Circuit's erroneous decision evidenced by BNO's argument warrants that the Court grant review to correct the misapprehension of the burden of proof and burden shifting issues of Rule 56 and to refine its holding in *Celotex* to assure the efficacy of summary motions as intended by the Court.

II. ARGUMENT

BNO acknowledges its complete failure despite over two years of discovery to produce any evidence to support its theory of solidary liability or the applicability of its prescription-interruption argument. To excuse this conceded failure, BNO asserts that it "was not required to submit any evidentiary proof regarding the issue of solidary liability," Opp. Br. at 5, because Arthur Young "failed to present evidence negating its solidary liability . . . thereby totally ignor[ing] its [summary judgment] burden of proof." Opp. Br. at 13.

BNO's argument misperceives the initial burden imposed on a party moving for summary judgment and the manner in which that burden may be met. In so doing, BNO ignores the showing made by Arthur Young

in support of its summary judgment motion and misapprehends the holding of *Celotex*.

ARTHUR YOUNG MET ITS INITIAL BURDEN OF PROOF

BNO's core argument is that Arthur Young did not present any evidence in support of its summary judgment motion to show that it was not liable *in solido*. Opp. Br. at 12-13. *Ergo*, BNO asserts, Arthur Young failed to meet its initial burden to inform the court of the basis for its motion and to identify those parts of the pleadings or other documents which demonstrate the absence of any genuine issue of material fact. Opp. Br. at 5-6.

BNO is simply wrong.[1] Arthur Young specifically met its initial burden under *Celotex* and Rule 56 by coming forward and (1) establishing that on the face of BNO's pleading filed in 1984 (and deemed filed in 1983)[2] the limitations period had expired before suit was filed and (2) providing undisputed record evidence of BNO's knowledge of a purported claim more than one year prior to filing.[3] *Celotex* expressly held that among the ways a

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1 BNO also states erroneously that Arthur Young did not address its initial burden as the movant in its Petition. Opp. Br. at 11. Arthur Young specifically addressed its initial burden and the manner by which it was met. Petition at 11-12.

2 Arthur Young also pointed to the parties' agreement drafted at the request of BNO and providing that any claim that had expired by August 10, 1983 could not be revived. Although the agreement acted to preclude BNO's claim, the Fifth Circuit disregarded it.

3 This second aspect was not addressed by the Fifth Circuit and is not at issue on this Petition.

movant can carry its burden is by relying on the pleadings. 106 S. Ct. at 2553. In this case Arthur Young did so by reference to BNO's own complaint and the *prima facie* bar apparent from its filing date and the corollary allegations of Arthur Young's alleged wrong in connection with its 1980 audit. In this manner, Arthur Young established that BNO's claim was time-barred on its face and shifted the burden to BNO so that unless BNO came forward with some evidence to overcome the obvious statute of limitations bar, Arthur Young was entitled to summary judgment. Since BNO failed to adduce any such evidence and to carry its burden, Arthur Young was not obligated to do anything more. Arthur Young thus met its initial burden under Rule 56 and *Celotex* in every respect and was entitled to judgment.

BNO repeatedly refers to and relies on the dissenting opinion in *Celotex* to support its argument. *See* Opp. Br. at 7-9. BNO ignores, however, the majority's specific holding that "the burden on the moving party may be discharged by 'showing' -- that is, pointing out to the District Court -- that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 106 S. Ct. at 2554. Arthur Young did precisely that by relying on the *prima facie* bar evident from its adversary's pleading and BNO's conceded failure to produce any contrary evidence.

Moreover, Arthur Young was not required, as BNO contends, to "support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.* at 2553. In the face of the patent limitations bar established by the complaint itself, *Celotex* required that BNO and not Arthur Young present sufficient evidence to show that Arthur Young was solidarily liable with the other defendants, *i.e.*, that BNO's loss was caused by the concurring tortious acts of Arthur Young and the other

defendants. *See* Petition at 13. BNO's attempt to place this burden on Arthur Young is contrary to the explicit holding of *Celotex* and the import of Rule 56.

III. CONCLUSION

Petitioner respectfully submits that when it demonstrated from the face of the pleading that the claim was barred, it met its initial burden under Rule 56 and the burden of negating such *prima facie* showing then shifted to the nonmovant. The very arguments presented by BNO founded on the dissent in *Celotex* and the erroneous Fifth Circuit decision demonstrate the failure of lower courts and litigants to recognize and understand the crucial burden shifting issues raised by Rule 56. Such error and potential for future error by other federal courts warrant this Court's review of the Fifth Circuit's decision.

Dated: January 25, 1988
New York, New York

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